(4)

Supreme Court, U.S.
FILED
JUN 5 - 2003
OFFICE OF THE CLERK

No. 02-1562

IN THE

Supreme Court of the United States

MARGARET A. MADIGAN,

Petitioner, pro se

v.

NABISCO, INC./RJ REYNOLDS, INC./KRAFT FOODS OF NORTH AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Margaret A. Madigan, pro se
Petitioner
295 Westview Ave.
Wadsworth, Ohio 44281
(330) 336-6987

13PP

TABLE OF CONTENTS

Page

Table of Contents..... i

Table of Authorities..... ii

Reasons for Granting the Writ..... 1

I. The Decisions Of The Courts Below Were Not Consistent With The Record Evidence And Violated Constitutional Law 2

II. The Questions Raised By Petitioner Do Require Review By This Court, Due to The Constitutional Issues Inherent In These Questions, Especially 14th Amendment Rights of due Process and Right To Fair Trial..... 3

Conclusion..... 10

TABLE OF CITED AUTHORITIES

Cases:

Blankenship v. Cincinnati Milacron Chemicals,
R.C. 4123.74 and 4123.741
(1982), 69 Ohio St. 2.608

Statues:

Section 902 of ADA, pg 12-19
902.3(b) of the ADA
902.4c (1)(12) of the ADA
1990 ADA
ADEA of 1967
Title VII
EPA

REASONS FOR GRANTING THE WRIT

First, and foremost, the Respondent **misstates** on page 6 of their Brief in Opposition that "Respondent never received any conclusive medical documentation that she had multiple sclerosis while employed by Respondent." While, in **FACT,** it is clearly seen and **understood** by **Respondent's** Exhibit C, presented to Petitioner and the Court in the Deposition by Respondent, that she **does** have Multiple Sclerosis and the **Respondent accepted** that as the truth by agreeing that she was having an exacerbation of her multiple sclerosis and was excused from work for it on 7/08/95 by Maryellen Valaitis, Human Resource Manager. (See pg. 97 through pg. 101of Deposition and Exhibit C) It is now time for the **Respondent** to take **responsibility** for ignoring the request for accommodation of the Petitioner's disability.

Furthermore, on page 9 of the Respondent's Brief in Opposition the Respondent **misstates** that "First, that issue is premature," while in **FACT** it is clearly seen in the Respondent's "Answer to Plaintiff's Amended Complaint, **3/19/01,** asking the Court that they **"be awarded its costs and attorney's fees."** Again, during the Deposition of Petitioner, **9/28/01**, the Respondent states **""And sanctions would mean, if awarded, that you would have to pay my attorney's fees and you would have to pay for the court reporter and everything that's involved in having to take that next deposition."** (See page 285 of deposition) The Respondent then asked the District Court to award costs in their Motion for Summary Judgment, **11/5/01, "at Plaintiff's cost."** and again in Reply in Support of its Motion for Summary Judgment, **11/21/01, "at Plaintiff's cost."** This demonstrates a repeated behavior of attempting to intimidate the Petitioner, and, not that the "Petitioner is anticipating that the Respondent will seek to recover its fees in this case." (Page 9 of Respondent's Brief in Opposition [**misstatement**]).

I.

THE DECISIONS OF THE COURTS BELOW WERE NOT CONSISTENT WITH THE RECORD EVIDENCE AND VIOLATED CONTITUTIONAL LAW.

Regarding violations of section 35, Article II of Ohio Constitution and the 14th Amendment of The United States Constitution.

A) OSHA Report (Exhibit D and 13 of HH) Exhibits 26, 27 (Depositions illustrating "chilling effect" and toxic exposure)

1) Failure to comply with OSHA's mandates for improved ventilation resulted in exposure to toxins – cigarette smoke and aspartame dust (inexorably linked to **Failure to Accommodate**)

2) OSHA Report (Exhibit 13) emanates from 1986 investigation; Exhibit D – Tim Ault's Notes from 1996 indicates improvements will be made to "general air flow" to regulate temperature and cigarette smoke. Thus, is an admission by defendant that ventilation improvements had not been made – ten years after OSHA mandates.

3) Exhibits 26 – #12, 13, 17, 18, 21 & 25; Exhibit 27 - # 3, 4, 16, 24, & Exhibit 28 – 3, 4, 6, 7, 11, 12, 13, 17, 24, 25 – These are co-worker's testimonies to ventilation problems and effects.

4) 3/10/03 Case #01-963 – Norfolk & Western R. Co. v Ayers

"...that dust exposures...contributed however slightly to each Plaintiff's injuries."

B) EEOC's Determination (Exhibit 10 of HH, PG 2) and regarding separation letter – Exhibits 9 of HH)

Investigation impeded due to intimidating terms of separation letter (14th Amendment violation – right to fair trial) (Due Process)

"Moreover, the waiver provision may produce a chilling effect, thereby undermining the Commission's ability to enforce **Title VII**, the **ADEA**, the **EPA** and the **ADA**. These provisions may intimidate or have the effect of intimidating employees and create

disincentive for them to cooperate with the **EEOC** in safeguarding the public interest."

Exhibit 26, # 8, 22; Exhibit 27 – 8, 21; Exhibit 28, # 19 – These illustrate pressure induced by separation letter and examples of age discrimination.

C) Memorandum Opinion and Order of District Court (No. 100CV 2919) Judge Donald C. Nugent of 2/19/2 failed to address"Failure to Accommodate" disability of Multiple Sclerosis (Specifically from 9/96 to 12/96) Thus, denying Plaintiff 14th Amendment Right to a fair trial. (Due Process)

D) ADEA violation (Violation of 14th Amendment right to fair trial) (Due Process

Sixth Circuit Court of Appeals ignored **PROOF POSITIVE EVIDENCE** (Defendant/Appellee's Admission) of **AGE DISCRIMINATION**, including irrefutable evidence of invalid non-discriminatory pretext.

E) Violation of Section 902 of ADA (Violation of 14th Amendment Right to Fair Trail – Due Process)

1) RJR/Nabisco did not provide accommodation of disability on 12/26/96 – upon receipt of letter from Plaintiff's sister; RJR/Nabisco did **NOT** notify Plaintiff that any form would be required until 1/10/97 (Exhibits J and K) (Please note Exhibit D – 9/3/96 where Tim Ault – supervisor – assures Plaintiff accommodation will be made and **NO** form is provided or required.)

2) The District and Appellate Courts perpetuate this violation by simply not responding to this period of time where Plaintiff's request for accommodation was blatantly ignored. **Please Note:** All lettered Exhibits provide **PROOF POSITIVE EVIDENCE** as Defendant submitted to Plaintiff in their deposition of her.

II.

THE QUESTIONS RAISED BY PETITIONER DO REQUIRE REVIEW BY THIS COURT, DUE TO THE CONSITITUTIONAL ISSUES INHERENT IN THESE QUESTIONS ESPECIALLY 14th AMMENDMENT

RIGHTS OF DUE PROCESS AND RIGHT TO FAIR TRIAL

1) Whether Petitioner's sister can speak on her behalf to request vital accommodation in her work environment is at issue in this case because the Respondent has chosen to deny notification-despite their own contradictory evidence. (Exhibit J – sister's letter- has attached confirmation of respondent's receipt dated 12/26/96; yet Exhibit K - Respondent's letter – confirms that the accommodation request form was given to petitioner 20 days after Petitioner's sister wrote letter requesting accommodation) If Respondent's "established procedure" for responding to a request for accommodation is to present a form to employee to complete; then, Respondent would have automatically given Petitioner forms upon receipt of Exhibit J. If Respondent is not familiar with their own alleged "established procedure" for requesting an accommodation; then, it is not reasonable to expect Petitioner to understand the nuances of alleged company policy.

Thus, if Petitioner's sister under section 902 of ADA is allowed to make request for vital accommodation in work environment; then, these two exhibits- J & K provide the court with a concise illustration of Failure to Accommodate Petitioner's Disability.

Additionally, **Toyota Motor Mfg. Ky. Inc.** does not apply in this issue, as the Petitioner is not refuting the Respondent's right to appropriate medical documentation but simply illustrating that it was provided. The Respondent has further contradicted itself about receipt of "Appropriate Medical Documentation" as indicated in Exhibit D – supervisor Tim Ault submits his own notes to the Court via Respondent's counsel – notes of 9/3/96 where supervisor Ault acknowledges Petitioner's request for temperature controlled environment & improved ventilation due to her health but does not request or provide form to be completed.

2) Petitioner filed Toxic Tort upon realization – discovery of OSHA report- That OSHA investigated for safe levels of aspartame dust at the Seville, OH plant, thus, acknowledging that unsafe levels and/or cumulative levels are possible. Besides, the toxic aspartame & cigarette smoke to which the Petitioner was exposed; and because of Petitioner's affliction of Multiple Sclerosis, excessive heat which resulted from improper ventilation subjected Petitioner to toxin of exposure to heated work environment thus the Toxic Tort is directly and inexorably linked to Failure To Accommodate Disability. There is a "private right of action for injured employees" and this concept was presented to the District Court. In **Blankenship v. Cincinnati Milacron Chemicals (1982), 69 Ohio St. 2d 608.** – "An employee is not precluded by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741 from enforcing his common law remedies against his employer for an intentional tort." **3)** Rule 14.5(pg. 13, Rules of the Supreme Court of the United States; adopted January 11, 1999; effective May 3,1999) addresses and explains concerns Respondent raises about the Court's actions in this case."This Court has also granted Petitioner leeway" (see page 7, pp.2, Respondent's Brief in Opposition) It appears that "The District Court..." did not permit "...Petitioner substantial leeway in presenting her claims" as she did not prevail with proof positive evidence when only preponderance of evidence was required. Furthermore, Respondent was granted considerable & substantial leeway by the District Court as greater credence was given to non-varifiable evidence - an alleged letter from a truck driver which alleged an unpleasant interaction with the Petitioner and was used as an argument for legitimate nondiscriminatory pretext in age discrimination (even though, one alleged incident does not constitute a representative sample of over 10 years of interactions with coworkers & customers; In fact, arguably, even if alleged interaction occurred, it is indicative of a stellar

record over time span of a decade.) Conversely, the District Court ignored evidence -Exhibit C- which is a doctor's note requesting Petitioner be excused from work due to "...flare of multiple sclerosis..." This is of vital significance because this document was presented to Petitioner in their deposition of her & thus because it is signed by a doctor from the world renowned "Cleveland Clinic Foundation" & initialed by "MV" – Maryellen Valaitis- who was head of human resources at Seville, Oh plant, It therefore, serves as Respondent's acknowledgement of Petitioner's Disability of Multiple Sclerosis (Exhibit C, combined with Exhibits B, D, J & O provide District Court with Proof Positive Evidence of Failure to Accommodate Disability) The District Court used these Exhibits to rule on case but ignored Exhibit C which is proof positive evidence that Respondent knew that Petitioner has disability of Multiple Sclerosis, even though Respondent did not contest legitimacy of Exhibit C. (incidentally, Exhibit C was presented to Petitioner on pages 97 & 98 of Respondent's deposition of her- COMPLETE DEPOSITION FILED IN DISTRICT COURT-PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGEMENT) Additionally, the District & Appellate Courts did not address "Failure to Accommodate" which transpired especially from 9/3/96-Exhibit D- and 1/10/97-Exhibit K. For these aforementioned reasons it appears that the District & Appellate Courts actually gave Petitioner less leeway on proper record evidence than was allowed Respondent. (Even though the Petitioner filed pro se). Consequently, the District & Appellate Courts are impeding justice and depriving Petitioner of Constitutional Right to Fair Trial & Due Process. Thus it is imperative that the Supreme Court of the United States grants a Writ of Certorari in this case as it is an issue which needs to be reviewed for the sake of the public interest especially employees with the Disability of Multiple Sclerosis.

4) O'Conner v. Consolidated Coin Caterers Corp. does not apply in this issue as the "employer"/Respondent did **NOT** "...present legitimate, non discriminatory reason for action taken" Furthermore, the Petitioner provided Proof Positive Evidence that refutes non-discriminatory pretext. The Respondent claims that their legitimate reasons for terminating Petitioner were issues regarding alleged performance problems:

A) Alleging " communication skills" needed to be improved (i.e. Pg. 4 of Brief in Opposition in Supreme Court) – this is based on subjective assessments of Petitioner by Respondent

B) "Ms. Madigan has disability of Multiple Sclerosis and is protected by section 902 of ADA, PG 12" " ... emotional processes...interacting with others are... examples of major life activites.19") (PG 7 of Reply Brief of Plaintiff –Appellant)

C) Incidentally, the aforementioned further defines Petitioner's Disability as does the "effects on daily life" which were presented to Court on all levels via "Response to Motion to Strike" (Respondent has difficulty acknowledging receipt of this document as well as "Relief Sought")

D) Respondent claimed that Petitioner was not keeping up with workload - this assertion is based on subjective reviews & no viable evidence was presented to support this argument.

E) Significantly, Respondent's argument for no sex discrimination under Title VII in the Appellate Court, he admitted that Ms. Madigan "assumed the duties of two shipping clerks" thus incriminating himself on issue that he-Respondent- was assessing Petitioner's performance based on an alleged inability to handle workload of two people. (This is blatant, Proof Positive evidence that negates non-discriminatory reasons for terminating Petitioner) Thus, it is denying Petitioner Due Process & Right to a Fair Trial to not grant Right to Jury Trial of peers on issue of AGE DISCRIMINATION as the Court has already

acknowledged Prima Facie but ignores valid refute to non – discriminatory pretext.

5) As stated throughout this case, Petitioner provided medical information to Respondent that confirms that the "Employee has a Disability"- Exhibits B & C, "Is a qualified person with a Disability"- Exhibit B & C –as presented at the District Court – initials of "head of human resources" at the Seville, Ohio plant must suffice as notification to Respondent that employee is "Qualified" because it is her job to know what ADA requires for "qualification" and if an employee cannot provide sufficient notice via head of human resources department then there is no pragmatic venue for employee to realistically inform employer; & " requires the requested Accommodation – Exhibits B,D & J.

6) This plea to the Court is based on the fact that the Petitioner has filed pro se and has presented the Court with a reasonable understanding and interpretation of requesting extension of statue of limitations on Toxic Tort especially to difficulties due to her Disability as her Doctor attests in Exhibits 20 & 58 –under "Physical Examination" of (pg 2 of 3) "...she seems easily baffled following directions on examination"

7) The issue presented in question 7 is that it is not reasonable for Petitioner to suspect that consumable products, which are deemed safe by Federal agencies, would contain Toxic ingredients. Thus, the statute of limitations on the Toxic Tort should be extended, as realization of this type of toxic exposure would understandably require Petitioner to "discover" these substances are Toxic. Again, filing toxic tort as Pro Se litigant amounts to proper legal request for extension of statute of limitations. Furthermore, these issues are of paramount significance to the Supreme Court as not only does not allowing Toxic Tort impede the Petitioner's right to a fair trial but has serious implications in interfering with SAFEGUARDING THE PUBLIC INTEREST from what may be aptly referred to as biochemical terrorism.

8) This issue –whether family member/friend may

speak on behalf of Disabled person who is proceeding pro se due to lake of financial resources and/or stamina in presenting Federal Case under Section 902 of ADA- is not only valid but is of great Constitutional significance as it is imperative to grant this right -in this case because of the frailty of Petitioner and effects of stress, i.e. Deposition (pg. 4 of Reply Brief of Appellant and "conclusion" of Plaintiff's Response to Defendant's Motion for Summary Judgment) & effects of stress on Petitioner's speech - exacerbation- speech slurring for a week after Deposition. Appropriate "official" application for right to speak will be filed as Court designates in appropriate time frame. Also, in safeguarding the public interest as those who are most vulnerable in society- those who are afflicted with disabilities will continue to have Constitutional rights disregarded by companies who will not be held accountable for their actions. Thus, burdening government agencies & tax payers to fund Social Security & Disability services for those in our society who have been damaged via – Failure to Accommodate Disabilities, Age Discrimination And Toxic Exposures- by inhumane corporate entities such as – RJR NABISCO, NABISCO BRANDS INC., NABISCO HOLDINGS CORP, KRAFT FOODS OF NORTH AMERICA, INC, KRAFT FOODS INC., ALTRIA GROUP INC., PHILLIP MORRIS COMPANIES INC., ALTRIA GROUP- WHO CAN AVOID ISSUES OF ACCOUNTABILITY BY "HIDING" THEIR IDENTITIES.

9) Respondent acknowledges that Petitioner "never obtained any severance pay" in it's response to this question. The coercion that is inherent in the Separation Letter is of great significance to the Supreme Court as it forces an employee to choose between Civil Rights granted by the Constitution of the United States of America (being American) – including protection against gender, age, race & religion discriminations & violations of rights of Disabled, protection from damages of Toxic exposures- Or reaping rewards of benefits accrued as a result of

his/her hard work, dedication and loyalty to his/her employer. The extensive damage incurred by the Petitioner in this case results from Failure to Accommodate Disability, Age Discrimination and Toxic Tort issues. Additionally, this **unconstitutional "Separation Agreement"** interferes with investigation as the EEOC asserts it has or may have "...effect of intimidating employees..." and thus impedes DUE PROCESS AND RIGHT TO A FAIR TRIAL. These types of "agreements" produce effects that are tragic in this case but are catastrophic on a national level.

10) The issue of granting the Respondent attorney's fees is not "premature" and their many requests for same are addressed in "Reasons for Granting The Writ" section of this paper.

The fact that the Respondent deems the claims in this case as "frivolous" illustrates its blatant disregard for the Petitioner, the EEOC, and the legal system itself. The reason the Respondent finds it "...extremely difficult to separate her factual arguments from her legal arguments." (Pg.4 of Respondent's Brief in Opposition in the SUPREME COURT OF THE UNITED STATES) is that there is NO defense for Respondent's actions against Petitioner neither during her employ nor throughout the court proceedings.

LET US SHOW TRIBUTE TO OUR GREAT PRESIDENT ABRAHAM LINCOLN BY REAFFIRMING "- THAT THIS NATION, UNDER GOD, SHALL HAVE A NEW BIRTH OF FREEDOM- AND THAT GOVERNMENT OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE SHALL NOT PERISH FROM THE EARTH."

CONCLUSION

For all the foregoing reasons and all additional reasons filed in all previously filed Court Documents, Petitioner respectfully requests that this Honorable Court grant the Petition.

Respectfully submitted,

Margaret A. Madigan, Petitioner, pro se
295 Westview, Wadsworth, OH 44281, 330-336-6987